IN THE SUPREME COURT
OF THE TERRITORY OF
PAPUA AND NEW GUINEA.

CORAM : MANN C. J.

Monday,
23rd September, 1968.

IN THE MATTER of the Companies Ordinance 1963-66.
AND
IN THE MATTER of STOL AIR SERVICES PTY. LTD.

J U D G M E N T

1968
September
23.
MORESBY.
MANN C.J.

This is an application on motion to retrain a petitioning creditor from taking further proceedings upon the petition and in particular from advertising the petition as required by the Rules until a scheme of arrangement is presented to the creditors of the Company to enable them to decide whether or not to accept the scheme.

The Company has very substantial assets and, on the information conveyed to me this morning by the affidavit and by Counsel for the Company, it appears that the interests of the creditors would be adequately secured by the Company's assets but that there might be some delay if the scheme is put into operation.

The petitioning creditor has a judgment in its favour and it is common ground that it has a right ex debito justitia to have the Company put into liquidation unless its claim is paid out or an offer of payment is available to it. It was argued for the Company on the authority of In re. A Company (1) and In re. Charles Forte Industries (2) that the Court in the exercise of its inherent jurisdiction can restrain the taking of any proceedings of this character which might do irreparable harm to the Company.

On the facts as they stand, I am satisfied that if I have discretion in the matter I should exercise it in favour of the Company to enable the

(1) (1894) 2 Ch.D. 349
(2) (1963) 2 All E.R. 940

creditors as a body to express their views. The intended scheme is one which concerns matters of business and finance and although it might appear to me to be a scheme capable of operating to the satisfaction of all concerned, these are questions pre-eminently appropriate for the Court to refer to the creditors and to act, so far as practicable, in accordance with their wishes.

I do not think that the cases cited on behalf of the Company conclude the matter, because they were cases in which the proceedings contemplated were shown to have been brought for an ulterior purpose and were an abuse of the process of the Court. This circumstance seems to me to be the justification for the Court making a direct order as part of the winding up proceedings without requiring that separate originating proceedings be taken to support an injunction. In its inherent jurisdiction the Court can simply reject proceedings improperly brought and refuse to entertain them and the granting of an injunction in the oourse of interlocutory proceedings in a winding up petition would appear to me to be merely incidental to the Court's rejection of the proceedings themselves.

The same reasoning cannot be made to apply to a petitioner who has not only brought his petition on sound grounds but is recognised as having a right ex debito justitia to have the Company wound up. I cannot reject that kind of petition simply in the hope that the creditors will find a scheme of arrangement to their liking.

I recognise the force of the principle that the whole body of creditors have a greater interest than is possessed by any single creditor and that the Court ought, if possible, to follow the wishes of the whole rather than those of the part, but it seems to me that this principle cannot prevail over the petitioner's undoubted right, nor, unless he is paid out or secured, can it justify an injunction as an interlocutory step in the petition proceedings.

I think that the only justification for interference by the Court is to be found, if at all,

in the provisions of Section 180(9) of the Companies Ordinance. The words in the sub-section are appropriate enough to cover the redress sought by the Company in these proceedings, although the application was not initially based on that section. The point that was specifically raised by the petitioning creditor is that the section requires a "proposed" scheme of arrangement and that the scheme cannot satisfy this requirement until it is actually "proposed" to somebody in specific terms, or at least to a representative number of creditors.

The petitioner relied on the judgment of Sholl J. In re. G.A.E. Pty. Ltd.(3), in which two earlier decisions were considered. It is clear from Sholl J.'s decision that it is not essential for every detail of the scheme of arrangement to be finally settled, but rather that the substance of the scheme must be there and must have been proposed to some appropriate parties. It is a critical point in the present case because I cannot say that a "proposed" scheme exists unless that existence is real, for this point goes to the jurisdiction of the Court, without which I have no discretion to exercise, and the petitioning creditor has a positive right to proceed.

Mr. Justice Sholl found that the details of the scheme before him were unsatisfactory, for the purpose, although they were much more detailed than anything that has been presented to me in the present case. He overcame the problem upon his finding that the scheme did exist in fact, by adjourning the winding up proceedings to enable the scheme to be corrected and amplified, so that after a short adjournment the complete scheme, approved by the Court for presentation to the creditors, was able to be presented at a creditors' meeting.

I think that this course should be followed in the present case, although the situation is not so strongly in favour of the Company. Section 180, sub-section 9, does not require the pre-existence of the scheme for any period of time and does not prescribe its formal contents. Any proposal may constitute a scheme and the creditors are safe-guarded from 153

(3) (1962) V.R. 252.

mischievous nuisance by the requirement that the proposed scheme be submitted to the Court. The prime function of the Court is to see that the scheme is in proper form and is a sensible and worthwhile proposal. It is open to the Court in the present case to find that the scheme has been proposed, because during the adjournments of the Petition and Notice of Motion, there have been discussions between the petitioning creditor and the Company to try to find some agreeable way of settling the petitioning creditor's claim.

Counsel for the Company during the course of his argument was able to state a number of figures, some of which have not yet been precisely determined and some of which are no better at the present time than estimates. Nevertheless, the figures, taken with the conditions under which the undertaking of the Company has been sold to another Company, present a complete picture of a scheme which, if finance is available for a short period to clear titles and await the payment of the balance due, could be carried into immediate effect leaving a cash balance of over $170,000 after payment of all creditors in full. It is unavoidable that some of these figures should be estimates and considerable work would need to be undertaken before precise figures could be arrived at. The most substantial items which govern the character of the whole transaction have been fixed by agreement, or are otherwise ascertainable within reasonable tolerances. Counsel stated on behalf of the Company that the scheme was that the monies which are to come to the Company under the agreement be transferred to an independent trustee who would pay monies over to the creditors as received, so that in any event they would all be fully paid within three years at the latest, even if the purchaser company exercises to the full its right to defer payment at the increasingly high rates of interest.

It seems to me that the scheme outlined by Counsel on behalf of the Company is, on the face of it, a sound one and will present to the general body of creditors the advantage of protection from the possibility of hasty action, inducing secured creditors to take unilateral action resulting in a

possible collapse of the Company's financial structure due to lack of available capital. A workable scheme would, of course, be of inestimable value to the Company and its shareholders, who would thereby avoid the risk of substantial loss. Bearing this in mind, I must yet avoid the possibility that the shareholders, in the hope of enhancing the present valuations, might find in these proceedings a means of delaying the petitioning creditor. The scheme must, therefore, be presented to the creditors as a matter of urgency.

I find that the scheme as presented to the Court is a "proposed" scheme, sufficient to satisfy Section 180(9) of the Companies Ordinance and I think that I should make a consequential Order to the same effect as that made by Sholl J. In re. G.A.E. Pty Ltd.(4).

I order that the petitioner be restrained until after the 1st October, from taking any further proceedings, (including the advertising of the petition), and order that the Company pay the taxed costs of the petitioning creditor of and incidental to this Motion.

In recognition of the strong position in which the petitioning creditor stands, I have intimated that the arrangement must be completed as a matter of urgency and should be presented to the Court for the Court's approval on an application for an order to convene a meeting of creditors. Although Section 180 does not expressly require that the scheme should be served on any particular party, I direct that in the present case it should be served on the petitioning creditor in the form in which it is to be presented to the Court and, by consent, I direct that service of the scheme is to be effected before midday on Monday, 30th September, 1968.

Solicitor for the petitioner : Norman White and Reitano.
Solicitor for the defendant : Wm. Lander and Co.

(4) (1962) V.R. 252.